IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE ADAMS GOLF, INC. SECURITIES LITIGATION	**CONSOLIDATED C.A. No. 99-371 KAJ**

PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF CLASS CERTIFICATION

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Defendants make two arguments: First, that only those who sell directly to plaintiffs in the IPO can be liable under Section 12(a)(2) of the Securities Act of 1933 (the "1933 Act"), 15 U.S.C. § 77l(a)(2) and second, that because there is no joint and several liability, the Court must set up sub-classes of plaintiffs who bought from each separate underwriter under the 1933 Act.

Plaintiffs have sufficiently pled that all Defendants are statutory sellers under the 1933 Act. *Pinter v. Dahl*, 486 U.S. 622, 644-47 (1988); *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 716 (3d Cir. 1996) (allegations that Defendants "were sellers . . . either sold or promoted the sale of said securities . . . and were motivated by a desire to serve their own financial interests" satisfied plaintiffs' pleading burden).[1]

Likewise, Defendants' claims on subclasses are not valid, especially when discovery is not completed. To the extent the underwriters participated in preparing the Prospectus, they solicited sales from all plaintiffs, and thus are statutory sellers to all Class Members. Once discovery is completed, the Court is entitled to revisit the issue and take appropriate steps if necessary.

I. ARGUMENT

A. Plaintiffs Have Sufficiently Pleaded That All Defendants are "Sellers" Under Section 12(a)(2).

A "seller," for purposes of Section 12(a)(1) of the Act, includes not only persons in privity with the purchaser, but also persons who solicit the purchase of securities, whether motivated by their own financial interest or those of the securities owner. *Pinter* 486 U.S. at 642-43. *In re Craftmatic Sec. Litig.*, 890 F.2d 628, 635-636 (3d Cir. 1990). Plaintiffs have pleaded Section

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[1] *See* Consolidated and Amended Class Action Complaint for Violation of Federal Securities Laws ("Complaint") at ¶¶ 69-72; Plaintiffs' Brief in Opposition to Defendants' Motions to Dismiss at 46-51. Although raised by Defendants in their motions to dismiss, Judge McKelvie did not reach this issue in his ruling. Opinion, *In re Adams Golf, Inc. Sec. Litig.*, No. 99-371, at *29, *44 (D. Del. entered Dec. 10, 2001). Yet Defendants failed to raise the issue following remand, electing instead to answer the Complaint.

12(a)(2) claims properly under this standard against all Defendants, as sellers or solicitors of Adams stock.

Contrary to Defendants' argument, a firm commitment underwriting, in which formal title to the stock passes from the issuer to the underwriter before passing to the ultimate purchaser, does not relieve the issuer or the issuer's management from potential liability under Section 12(a)(2). *Pinter*, 486 U.S. at 642-46 (offer means "every attempt or offer to dispose of or solicitation of an offer to buy a security ..." so one who solicits but does not pass title may be liable). Defendants' reliance on *Shaw v. Digital Equipment Corp.*, 82 F.3d 1194, 1215 (1st Cir. 1996) is misplaced, especially since the First Circuit acknowledged that "Section 12 liability is not limited to those who actually pass title to the suing purchaser." *See In re Twinlab Corp. Sec. Litig.*, 103 F. Supp. 2d 193, 204 (E.D.N.Y. 2000) (privity argument has been "substantially undercut" by post-*Pinter* decisions).

Rather, the great weight of authority has declined to dismiss 12(a)(2) claims against issuers when, as here, plaintiffs allege that the issuer and its agents played a role in soliciting sales. *Craftmatic*, 890 F.2d at 636 (upholding Section 12(a)(2) claims on allegations substantially similar to those of the Complaint). Plaintiffs have sufficiently alleged that all Defendants solicited the Plaintiffs' stock purchases for their own financial benefit. Thus, the complaint satisfies *Pinter's* seller criteria. *Pinter*, 486 U.S. at 646.-47. All Defendants were involved in soliciting investors to purchase Adams Golf stock in that (1) the Adams Golf Prospectus was a solicitation document; (2) Defendants participated in and/or supervised and controlled those who participated in the preparation and issuance of the Prospectus, Complaint ¶¶ 70-72; (3) the Adams Golf Defendants signed the Registration Statement as officers and/or directors of the issuer, Complaint ¶ 10; (4) the Adams Golf Defendants participated in road shows and otherwise promoted Adams stock in advance of the IPO; and (5) Defendants obtained direct and substantial financial benefits from the offering.

Although Plaintiffs' claims satisfy the requirements of *Pinter* and *Craftmatic*, the existence of cases from other Circuits in which courts found on different facts that no solicitation occurred[2] merely serves to demonstrate how fact specific these merits-based issues regarding seller status are. Such issues are more appropriately addressed after meaningful opportunity for both sides to investigate the facts through discovery.

B. The Facts Do Not Warrant Subclassing.

In securities litigation, certification of a single, unified class with respect to all claims against all defendants, including 12(a)(2) claims against underwriters, is the norm. *See, e.g., In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. 267 (S.D.N.Y. 2003). Here, since all underwriters participated in drafting the Prospectus and soliciting class members, all underwriters are statutory sellers to those who bought stock in the IPO. There is no reason to treat underwriters who pass title to buyers and underwriters who solicited buyers differently.

Rather, the issue Defendants raise relates only to the nature and amount of damages to which each class member is entitled and from whom she or he may be entitled to collect. Courts have repeatedly declined to create subclasses to address such issues, however, as these matters can easily be addressed as a function of claims administration. "[I]t has been commonly recognized that the necessity for calculation of damages on an individual basis should not preclude class determination when the common issues which determine liability predominate." *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 456 (3d Cir. 1977).

Moreover, where such issues require the creation of subclasses, such decisions are properly postponed until at or near the conclusion of the case. Courts are given ongoing jurisdiction over class certification issues and have the discretion to adjust or modify the class definition as a part of

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[2] *E.g., Shaw v. Digital Equip. Corp.*, 82 F.3d 1194 (1st Cir. 1996); *In re Newbridge Networks Sec. Litig.*, 767 F. Supp. 275 (D.C. 1991).

their role in managing class actions. Fed. R. Civ. P. 23(c)(1), *see also,* Fed. R. Civ. P. 23(d); 2 NEWBERG ON CLASS ACTIONS §8.12 at 200.

In light of the Court's discretion to adjust class certification rulings if and when the need presents itself, there is good reason to exercise caution when considering proposals to create subclasses, especially when they involve damages issues which may be taken care of at the time of settlement.

II. CONCLUSION

For the reasons set forth herein, Plaintiffs respectfully request that the Court deny the Defendants' arguments based on *Pinter* and deny Defendants' request for subclasses.[3]

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[3] Lastly, in response to this Court's inquiry on the issue of the proper class period ending date, *Klein v. A.G. Becker Paribas Inc.*, 109 F.R.D. 646 (S.D.N.Y. 1986), is factually different. The *Klein* court found that information omitted from the prospectus was disclosed by the media between July 25 and 28, 1983, and available to investors who purchased stock after that date. *Klein*, 109 F.R.D. at 652. *The Klein* court ended the class period in July (rather than in August as urged by plaintiffs), holding that "a section 11 and 12(2) claim, which is based upon a lack of information, could not be typical of such a claim made by persons who possessed additional information." *Id.* at 652.

Here, Adams Golf's October 28, 1998 press release constituted only a partial disclosure. The October 28, 1998 disclosure, unlike the January 7, 1999 disclosure, misrepresented that it was possible gray marketing could be eliminated by the end of 1998, suggesting a short-term annoyance rather than a long-term trend; concealed the need for a $4.3 million charge as a result of gray marketing; and overstated 1999 prospects. In any event, when questions of fact remain about whether a purportedly curative press release effected a complete cure of disclosure defects, certification of the broader class period is proper. *In re WorldCom, Inc. Sec. Litig.*, 219 F.R.D. at 307 (citing *Sirota v. Solitron Devices, Inc.*, 673 F.2d 566, 572 (2d Cir. 1982).

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CERTIFICATE OF SERVICE

I, Carmella P. Keener, hereby certify that on this 24th day of May, 2005, I electronically filed **Plaintiffs' Supplemental Memorandum In Support Of Class Certification** with the Clerk of Court using CM/ECF, which will send notification of such filing to the following:

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